

January 16, 2008

Charles S. Caulkins, Esquire
Fisher & Phillips LLP
450 East Las Olas Boulevard, Suite 800
Fort Lauderdale, FL 33301

Re: Gimrock Construction, Inc.
Case 12-RM-402

Dear Mr. Caulkins:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

As a result of the investigation, I find that further proceedings are unwarranted. Accordingly, I am dismissing the petition in this matter. The following constitutes the Region's basis for dismissal.

Gimrock Construction, Inc. (the Employer), with its principal office and place of business located in Hialeah (Dade County), Florida, is a heavy civil marine construction contractor operating throughout southern Florida and the Caribbean, employing a general workforce consisting of construction specialists and mechanics, as well as a number of operating engineers, who possess the skills necessary for the operation of much of the heavy equipment utilized in the course of the Employer's work. During the approximate period beginning in about 1987 until 1995, the Employer and International Union of Operating Engineers, Local 487 (the Union or Local 487) were signatories to a series of Section 8(f) prehire agreements on a project-to-project basis, under which agreements the Union referred applicants for employment with the Employer through its referral hall. Thereafter, on January 26, 1995, the Union filed a representation petition in Case 12-RC-7816 seeking Section 9(a) bargaining representative status of the Employer's employees in the following unit:

All equipment operators, oiler/drivers and equipment mechanics employed by the Employer in Dade and Monroe counties in Florida, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

Case 12-RM-402

page 2

Following an election by secret ballot held on March 3, 1995, the Union was certified as the exclusive bargaining representative of employees in the unit described above on March 20, 1995.

After the Union's certification, the parties engaged in unsuccessful negotiations, which were the subject of unfair labor practice charges filed in Cases 12-CA-20173 and 12-CA-20527 alleging violations under Section 8(a)(1) and (5) of the Act. As a result of said charges, which

were fully litigated and adjudicated, the Board, on June 30, 2005, at 344 NLRB No. 112 (2005), found that the Employer, while continuing to refuse to supply information to the Union during bargaining negotiations, refused to meet and bargain with the Union. It was noted in the decision that the Employer continuously hindered negotiations by insisting that the bargaining unit was other than that proposed by the Union, and other than that described in the NLRB certification. Thus, based on the proven violations that the Employer refused to bargain with the Union about employees in the certified unit and that the Employer refused to supply the Union with requested information relevant to which employees should be included in the certified bargaining unit, the Board ordered, among other things, that the Employer, on request, meet and bargain with the Union as the exclusive collective-bargaining representative of its employees in the above-described bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. On December 26, 2006, the Board's Decision and Order was enforced by the United States Court of Appeals for the Eleventh Circuit.¹

Shortly after the Court's enforcement of the Board's decisions, on January 17, 2007, in writing, the Union requested the Employer to meet and bargain with it. The Employer ignored the Union's bargaining demand. Additionally, on January 24, 2007, in writing, the Region requested that the Employer initiate immediate compliance with the enforced Board Orders. The Employer failed and refused to comply as requested. On February 27, 2007, the Union renewed its bargaining demand, in writing. Again, the Employer failed and refused to respond to the Union's bargaining request. Subsequently, on March 2, 2007, the Region recommended the initiation of Contempt proceedings against the Employer based on its unwillingness to comply with the enforced Board Orders. [No. 07-CLB-57]

Thereafter, the Employer, through its counsel, advised the Contempt Litigation Branch that, based upon the language of the Union's certification, it does not have a bargaining obligation to the Union; and that its only obligation to the strikers is to place them on a preferential hiring list to be hired, in the event the Employer obtains work in Monroe and Dade Counties. The Employer further asserted that it does not anticipate operating in either of these counties in the future, and according to the deposed testimony of Employer Vice President

¹ Also, on June 30, 2005, in a separate Supplemental Decision and Order in Case 12-CA-17385, the Board reaffirmed its original decision reported at 326 NLRB 401 (1998), finding that the Employer violated Section 8(a)(1) and (3) of the Act by failing to reinstate seven economic strikers upon their unconditional offer to return to work, and ordered that the Employer offer reinstatement to the strikers. The Board's original decision and its supplemental decision, as reported at 344 NLRB No. 128 (2005), were enforced by the United States Court of Appeals for the Eleventh Circuit on December 26, 2006. [Nos. 05-15860 and 05-16096]

Lloyd Hunt, that it has not operated in Monroe and Dade Counties since about December 2006.² To date, the Employer has not responded to the Union's bargaining requests, or complied with other affirmative obligations under the enforced Board Orders. Since the issuance of the Court's judgment, the Employer provided some payroll record information after being ordered to do so in a subpoena enforcement proceeding before the District Court, and has complied with the Board's notice-posting requirements, but did not begin to post until after September 20, 2007.³

The RM petition in the instant case was filed by the Employer on December 12, 2007. (copy attached) At the time it filed the petition, the Employer failed to submit any showing or evidence of objective considerations relating to the incumbent Union's continued majority status, and the Region, by letter dated December 14, 2007, requested the submission of the Employer's showing of objective considerations within 48 hours. In response, the Employer's counsel submitted a position letter dated December 18, 2007, accompanied by an affidavit given by Employer Vice President Lloyd Hunt, who states that the Employer's last construction project in Dade or Monroe Counties was completed on or about August 2005;⁴ that since that date, the Employer has not had any construction workers who are even arguably covered by the NLRB's unit certification performing any construction work on any construction projects in Dade or Monroe Counties; that the Employer has not hired subcontractors to perform any construction work in those counties during that period; that during that same period, the Employer had no business dealings with Local 487; and that Local 487 recently requested that the Employer bargain despite the fact that there are no employees in the bargaining unit.

In its position letter, Employer's counsel argues that since the Employer has not employed any employees within the jurisdiction of the bargaining unit for over two years, the Company has objective reasons to justify a *decertification* election. In support, the Employer cites NLRB v. WGOK, Inc., 384 F.2d 500, 66 LRRM 2338 (5th Cir. 1967), as standing for the rule that the Board will not certify a single-employee unit.⁵ The Employer's counsel argues that whether or not any eligible employees may appear to vote is irrelevant to the question of whether the Board has the authority to hold an election pursuant to a valid RM petition, to consider the result of the vote, and to certify the results of the election. Therefore, the Employer requests that the Region proceed to an election in this case. In the alternative, the Employer

² Hunt's deposed testimony appears inconsistent with the statement in Hunt's affidavit, submitted in support of the Employer's objective considerations, that the Employer's last construction project in Dade or Monroe Counties was completed on or about August 2005. In addition, it appears that the Employer still operates from its facility located in Dade County, which includes a shop and/or a yard.

³ In an ancillary proceeding before the United States District Court of the Southern District of Florida, Miami Division, the Contempt Litigation Branch sought payment of attorney fees and reimbursement of certain expenses against the Employer. On December 18, 2007, the Court issued its Order adopting the report and recommendation of the magistrate judge awarding attorney's fees and costs to the Board. [Case 07-22366-CIV-MARTINEZ-BANDSTRA]

⁴ As noted above, this statement appears to be inconsistent with Hunt's deposed testimony that the Employer has not operated in Monroe and Dade Counties since about December 2006.

⁵ The fact that the Board does not certify single-employee units appears to detract from the Employer's argument that the Board should conduct an election even when there are no employees in a bargaining unit. There would be no useful purpose served by conducting such an election since the Board would not certify the results.

requests the Regional Director revoke the certification of Local 487, pursuant to Casehandling Manual, Part II, Representation Proceedings at Section 11478.3, which states as follows: "A Regional Director has the authority to revoke a certification on a motion by one of the parties or on his/her own initiative, if he/she feels that revocation is appropriate in a given situation." The Employer's counsel further asserts that for the Board to expect the Employer to bargain with the Union over a nonexistent employee group would be unwarranted and would impose undue burdens on the Employer, without offsetting benefits to the Union.

The Employer's claim, as asserted in its objective considerations, that it currently does not employ any bargaining unit employees is disputed by the Union. Nevertheless, even assuming solely for the sake of argument, the accuracy of the Employer's claim, it would not provide a basis for processing this petition seeking an election.⁶ In addition, the proven unfair labor practices committed by the Employer here are the type that condition or preclude a question concerning representation as they include Section 8(a)(5) violations and a remedial bargaining order, and thus require dismissal of the instant petition. See 11730.3(b) and 11733.2(a)(2) of the Casehandling Manual. Additionally, the Employer's petition was filed less than a year since the entry of court decrees directing the Employer to bargain, and prior to the commencement of bargaining.⁷

Further, I find that the objective considerations submitted by the Employer, in the context of the proven unfair labor practices, are not reliable or objective evidence to establish good-faith uncertainty as to the Union's continued majority status, given the Employer's failure and refusal to remedy the proven unfair labor practices. In this regard, it is noteworthy that in addition to refusing to meet and bargain with the Union and provide requested information, the Employer has also failed and refused to offer reinstatement to any of the strikers, as required by the Court-enforced Board Orders.

In regard to the Employer's contention that it is somehow justified in seeking revocation of the Union's certification, despite the fact that it has been proven to have engaged in serious unfair labor practice conduct violative of the Act, and that it has been ordered, among other things, to meet and bargain with the Union, upon request, I find such contention to be wholly without merit and entirely inconsistent with the Board's Court-enforced remedial orders. Thus, a question concerning representation cannot be raised at this time given the violations found to have been committed by the Employer in refusing to meet and bargain with the Union, and by continuing to refuse to supply relevant information concerning which employees are included in the certified bargaining unit. Therefore, I am dismissing the above petition.⁸

With regard to the Employer's alternative position that the undersigned revoke the Union's certification of representative, such request is hereby denied as it would be completely inappropriate in these circumstances.

⁶ See generally, Al & Dick's Steak House, Inc., 129 NLRB 1207 (1961).

⁷ Compare Ellis-Klatcher & Co., 79 NLRB 183 (1948); Mascot Stove Co., 75 NLRB 427 (1948).

⁸ It is also noted that a formal Complaint and Notice of Hearing is currently pending against the Employer in Case 12-CA-24633 which alleges similar Section 8(a)(1) and (5) violations.

Pursuant to the National Labor Relations Board's Rules and Regulations, Series 7, as amended, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570. A copy of such request must be served on the Regional Director and each of the other parties to the proceeding. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. The request for review (eight copies) must be received by the Executive Secretary of the Board in Washington, DC by close of business on **January 30, 2008**, at 5 p.m. (ET). You should be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, however, the Board may grant special permission for a longer period within which to file.

A request for review may also be submitted by electronic filing. See the attachment provided in the initial correspondence in this case or refer to OM 05-30 and OM 07-07, which are available on the Agency's website at www.nlrb.gov for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. Guidance can also be found under *E-Gov* on the Board's website. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, either by mail or by electronic filing. The request for extension of time should be submitted to the Executive Secretary of the Board in Washington, DC, and a copy of any such request for extension of time should be submitted to the Regional Director and to each to this proceeding. The request for review and any extension of time for filing must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding, and a copy must be served in the same or faster manner as that utilized in filing the request with the Board. When filing with the Board is accomplished by personal service, however, the other parties shall be promptly notified of such action by telephone, followed by service of a copy by mail.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-Filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, select the *E-Gov* tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-Filing instructions explaining how to file the documents electronically will be displayed.

The request for review and any request for extension of time must include a statement that a copy has been served on this office and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Sincerely,

/s/ [Rochelle Kentov]
Rochelle Kentov
Regional Director

Attachment

cc:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Lloyd Hunt, Vice President
Gimrock Construction, Inc.
13915 NW 107th Avenue
Hialeah Gardens, FL 33018

Kathleen Phillips, Esquire
Phillips, Richard & Rind, PA
9360 SW 72nd Street, Suite 283
Miami, FL 33173

Gary Waters, Business Manager
International Union of Operating Engineers,
Local 487, AFL-CIO
1425 NW 36th Street
Miami, FL 33142